

1 3. Among other things, the EFTA imposes certain disclosure requirements upon
2 operators of automated teller machines (“ATMs”).

3 4. 15 U.S.C. § 1693b(d)(3)(A) requires any ATM operator who imposes fees on
4 consumers in connection with electronic fund transfers to provide notice of the fact that the
5 fee is being imposed and the amount of the fee.¹

6 5. 15 U.S.C. § 1693b(d)(3)(B) identifies the location where the required notice
7 must be posted as follows:

8 (B) Notice requirements

9 (i) On the machine

10 The notice required under clause (i) of subparagraph (A) with respect to any
11 fee described in such paragraph shall be posted in a prominent and
12 conspicuous location on or at the automated teller machine at which the
electronic fund transfer is initiated by the consumer.

13 (ii) On the screen

14 The notice required under clauses (i) and (ii) subparagraph (A) with respect
15 to any fee described in such subparagraph shall appear on the screen of the
16 automated teller machine, or on a paper notice issued from such machine,
17 after the transaction is initiated and before the consumer is irrevocably
committed to completing the transaction....

18 6. The relevant implementing regulation, 12 C.F.R. § 205.16(c) reinforces
19 EFTA’s statutory posting requirement, mandating that the mandatory fee notice: 1) be posted
20 in a “prominent and conspicuous location” on or at the ATM machine; and 2) “on the screen
21 of the automated teller machine or by providing it on paper, before the consumer is
22 committed to paying the fee.” 12 C.F.R. § 205.16(c)(1) and (2).

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24
25 ¹ “Electronic fund transfer” is defined as “any transfer of funds, other than a transaction originated by check,
26 draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or
27 computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an
28 account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine
transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone....” 15 U.S.C. §
1693a(6).

1 7. 15 U.S.C. § 1693b(d)(3)(C), and its implementing regulation, 12 C.F.R.
2 205.16(e), prohibit ATM operators from imposing a fee on a consumer unless EFTA's notice
3 and posting requirements are followed by the ATM operator.

4 8. Specifically, 15 U.S.C. § 1693b(d)(3)(C) states, in relevant part:

5 (C) Prohibition on fees not properly disclosed and explicitly assumed by the
6 consumer

7 No fee may be imposed by any automated teller machine operator in
8 connection with any electronic fund transfer initiated by a consumer for
which a notice is required under subparagraph (A), unless—

9 (i) The consumer receives such notice in accordance with subparagraph
10 (B)...

11 9. In connection with the 2006 amendments to the EFTA, the board of
12 governors of the Federal Reserve published its final rule and official staff interpretation
13 which, *inter alia*, explained the EFTA's disclosure requirements as follows:

14
15 The final rule clarifies the two-part disclosure scheme established in Section
16 904(d)(3)(B) of the EFTA. The first disclosure, on ATM signage posted on or at the
17 ATM, allows consumers to identify quickly ATMs that generally charge a fee for use.
18 This disclosure is not intended to provide a complete disclosure of the fees associated
19 with the particular type of transaction the consumer seeks to conduct. Until a consumer
20 uses his or her card at an ATM, the ATM operator does not know whether a surcharge
will be imposed for that particular consumer. Rather it is the second, more specific
disclosure, made either on the ATM screen or on an ATM receipt, that informs the
consumer before he or she is committed to the transaction whether, in fact, a fee will be
imposed for the transaction and the amount of the fee...

21 71 F.R. 1638, 1656.

22 10. The EFTA imposes strict liability upon ATM operators which fail to comply
23 with its disclosure requirements. *See e.g., Flores v. Diamond Bank*, 2008 WL 4861511
24 (N.D. Ill., Nov. 7, 2008). *Cf. Bisbey v. D.C. National Bank*, 793 F.2d 315, 318-19 (D.C. Cir.
25 1986). ("Among the protections afforded to consumers is the right to receive notice from the
26 ATM operator of the existence and amount of any fee that operator might impose on
27 consumers for conducting transactions at the ATM. 15 U.S.C. § 1693b(d)(3). This requires
28

1 the ATM operator to place notice both on the machine itself and upon the ATM screen. 15
2 U.S.C. §1693b(d)(3)(B)”). A plaintiff seeking statutory damages under the EFTA need not
3 prove that he or she has sustained any actual financial loss, or that he or she relied upon the
4 lack of mandatory disclosure as an inducement to enter the transaction. *See Burns v. First*
5 *American Bank*, 2006 WL 3754820 *6 (N. D. Ill., Dec. 19, 2006) (“Section 1693b(d)(3)
6 prohibits an ATM operator from charging a fee unless it provides notice of its fee on the
7 machine and on the screen, period, no mention of a necessary scienter.”)

8 9 **JURISDICTION AND VENUE**

10 11. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and
11 15 U.S.C. § 1693 *et. seq.*

12 12. Plaintiff’s claims asserted herein arose in this judicial district and Defendant
13 does substantial business in this judicial district and/or is the operator of ATMs in this
14 judicial district.

15 13. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) and (c) and
16 1400(a) in that this is the judicial district in which a substantial part of the acts and omissions
17 giving rise to the claims occurred.

18 **PARTIES**

19 14. Plaintiff, Don Anderson, is and at all times relevant hereto was a resident of
20 the state of New York.

21 15. Defendant, COMMUNITY TRUST & BANKING COMPANY is located at
22 9125 Lee Highway, Ooltewah, Tennessee 37363.

23 16. Defendant is an automated teller machine operator, as that term is defined by
24 12 C.F.R. § 205.16(a) which states: “Automated teller machine operator means any person
25 that operates an automated teller machine at which a consumer initiates an electronic fund
26 transfer or a balance inquiry and that does not hold the account to or from which the transfer
27 is made, or about which the inquiry is made.”
28

1 **FACTS RELATED TO PLAINTIFF'S TRANSACTION**

2 Specifically, Plaintiff made a cash withdrawal from Defendant's ATM at the
3 following locations:

4 (a) On or about September 2, 2012, Plaintiff made an electronic fund
5 transfer at Defendant's ATM located at 9125 Lee Highway, Ooltewah,
6 Tennessee. Defendant charged Plaintiff a fee of \$3.00 in connection
7 with the above-described transaction.

8 17. At the time of the above-described electronic transaction, Plaintiff did not
9 maintain any accounts with Defendant.

10 18. At the time of the above-described transaction, Defendant was acting as an
11 "automated teller machine operator" that operated the automated teller machine at which
12 Plaintiff initiated an electronic fund transfer or a balance inquiry.

13 19. However, at the time of the above-described transaction, there was no notice
14 posted "on or at" the ATM operated by Defendant apprising consumers that a fee would be
15 charged for use of the ATM.

16 20. Because Defendant did not post the required notice, it was not permitted to
17 charge a usage fee to Plaintiff and other class members.

18 **CLASS ACTION ALLEGATIONS**

19 21. Plaintiff brings this class action on behalf of himself and all other similarly
20 situated pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

21 22. Plaintiff seeks to represent a class of persons to be defined as follows:

22 All persons who during the year preceding the filing of Plaintiff's complaint:
23 1) where charged a "terminal fee" at Defendant's ATM located at 9125 Lee
24 Highway, Ooltewah, Tennessee, which was operated by Defendant when
25 such persons made an electronic fund transfer and/or balance inquiry where,
26 2) no notice indicating that such fee was to be charged was posted on or at
27 the outside of the ATM machine.

28 23. Congress expressly intended that the EFTA would be enforced, in part,
through private class actions. 15 U.S.C. § 1693m(a).

 24. The EFTA's class action enforcement provisions are identical, in relevant
part, to the class action enforcement provisions of other consumer protection statutes and
housed within the Consumer Credit Protection Act. (15 U.S.C. § 1692 *et seq.*) There is

1 abundant authority interpreting and applying these statutory class action provisions,
2 throughout the federal judiciary. Federal courts have routinely certified classes relating to
3 consumer claims for statutory damages, generally, and for violation of the EFTA's ATM fee
4 disclosure provisions, specifically. *See, e.g., Hammer v. JP's Southwestern Foods, LLC, No.*
5 *08-cv-0339 (W.D. Mo.)(Gaitan, J.); Flores, supra 2008 WL 4861511 at 3-5; Burns, supra,*
6 *2006 WL 3754820 at *11-12; Jackman v. Global Cash Access Holdings, 09-cv-897 (W.D.*
7 *Pa.)(McVerry, J.)(class certified and final settlement approval granted); Nolf v. Allegheny*
8 *Bank of Pittsburgh, 09-cv-645 (W.D.Pa.)(Bissoon, J.)(class certified and final settlement*
9 *approval granted); Dragotta v. Northwest Bancorp, Inc. d/b/a Northwest Savings Bank, 09-*
10 *cv-632 (W.D. Pa.)(Fischer, J.) .)(class certified and final settlement approval granted);*
11 *Parker v. First-Citizen Bank & Trust Company, 09-cv-0588 (M.D. Tenn.)(Campbell, J.)*
12 *.(class certified and final settlement approval granted); Polevoy v. Devon Bank, 08-cv-4822*
13 *(N.D. Ill.)(Kennelly, J.) (class certified and final settlement approval granted);Ochart v.*
14 *Broadway Bank, 08-cv-4893, (N.D. Ill.)(Castillo, J.)(class certified and final settlement*
15 *approval granted);Anthony v. Fifth Third Bank (Chicago), 08-cv-4359, (N.D. Ill)(Schenkier,*
16 *J.)(class certified and final settlement approval granted); Zintel v. Financial Partners Credit*
17 *Union, (C.D. CA), SACV 09-0868. (class certified and final settlement approval granted).*

18 25. Numerosity: The class described above is so numerous that joinder of all
19 individual members in one action would be impracticable. The disposition of the individual
20 claims of the respective class members through this class action will benefit both the parties
21 and this Court.

22 26. Plaintiff is informed and believes, and thereon alleges, that there are at
23 minimum, thousands of members of the class described above.

24 27. The exact size of the class and the identities of the individual members thereof
25 are ascertainable through Defendant's records.

26 28. Members of the class may be notified of the pendency of this action by
27 techniques and forms commonly used in class actions, such as by published notice, e-mail
28

1 notice, website notices, first class mail, or combinations thereof, or by other methods suitable
2 to this class and deemed necessary and/or appropriate by this Court.

3 29. Typicality: Plaintiff's claims are typical of the claims of the members of the
4 class. The claims of the Plaintiff and members of the class are based on the same legal
5 theories and arise from the same unlawful and willful conduct.

6 30. Plaintiff and members of the class were each consumers who used an ATM
7 machine operated by Defendant to make an electronic fund transfer or balance inquiry and
8 were charged a terminal owner fee, notwithstanding that the posting providing notice of the
9 fee required by EFTA "on or at" Defendant's terminals was not present.

10 31. Common Questions of Fact and Law: There is a well-defined community of
11 interest and common questions of fact and law affecting members of the class.

12 32. The questions of fact and law common to the class predominate over
13 questions which may affect individual members and include the following:

- 14 a. Whether, under 15 U.S.C. § 1693b(d)(3)(A) and 12 C.F.R. 205.16,
15 Defendant was, at all relevant times, an automated teller machine
16 operator that imposed a fee on consumers for providing host electronic
fund transfer services to those consumers;
- 17 b. Whether Defendant complied with the notice requirements of 15
U.S.C. § 1693(d)(3)(B) and 12 C.F.R. 205.16; and,
- 18 c. Whether Plaintiff and members of the class are entitled to statutory
19 damages, costs and/or attorneys' fees for Defendant's acts and
conduct.

20 33. Adequacy of Representations: Plaintiff is an adequate representative of the
21 class because his interests do not conflict with the interests of the members of the class.
22 Plaintiff will fairly, adequately, and vigorously represent and protect the interests of the
23 members of the class and has no interests antagonistic to the members of the class. Plaintiff
24 has retained counsel who is competent and experienced in the prosecution of class action
25 litigation.

26 34. Superiority: A class action is superior to other available means for the fair
27 and efficient adjudication of the claims of the class. While the aggregate damages which
28 may be awarded to the members of the class are likely to be substantial, the damages

1 suffered by the individual members of the class are relatively small. As a result, the expense
2 and burden of individual litigation makes it economically infeasible and procedurally
3 impracticable for each member of the class to individually seek redress for the wrongs done
4 to them. Plaintiff does not know of any other litigation concerning this controversy already
5 commenced by or against any member of the class. The likelihood of the individual
6 members of the class prosecuting separate claims is remote. Individualized litigation would
7 also present the potential for varying, inconsistent, or contradictory judgments, and would
8 increase the delay and expense to all parties and the court system resulting from multiple
9 trials of the same factual issues. In contrast, the conduct of this matter as a class action
10 presents fewer management difficulties, conserves the resources of the parties and the court
11 system, and would protect the rights of each member of the class. Plaintiff knows of no
12 difficulty to be encountered in the management of this action that would preclude its
13 maintenance as a class action.

14 **SUBSTANTIVE VIOLATION**

15 35. 15 U.S.C. § 1693b(d)(3)(A) provides that as a prerequisite to imposition of a
16 usage fee upon a consumer for host transfer services, an automated teller machine operator
17 must provide notice to the consumer consistent with subparagraph (B) of that statutory
18 section.

19 36. Subparagraph (B) of 15 U.S.C. § 1693(d)(3) provides in relevant part:

20 (B) Notice requirements

21 (iii) On the machine

22 The notice required under clause (i) of subparagraph (A) with respect to any
23 fee described in such subparagraph shall be posted in a prominent and
24 conspicuous location on or at the automated teller machine at which the
electronic fund transfer is initiated by the consumer.

25 37. In turn, subparagraph (c) of 15 U.S.C. § 1693b(d)(3) states, in relevant part:

26 (C) Prohibition on fees not properly disclosed and explicitly assumed by the
27 consumer
28

1 No fee may be imposed by any automated teller machine operator in
2 connection with any electronic fund transfer initiated by a consumer for
which a notice is required under subparagraph (A), unless—

3 (i) The consumer receives such notice in accordance with subparagraph (B)...

4 38. EFTA's statutory notice requirements are reinforced by the implementing
5 regulations set forth at 12 C.F.R. § 205.16.

6 39. Defendant violated the notice requirements of EFTA in connection with
7 providing host transfer services to Plaintiff and the Class.

8 40. Defendant was prohibited from imposing any usage fee or similar fee for
9 providing host transfer services because it failed to comply with EFTA's notice
10 requirements.

11 41. 15 U.S.C. § 1693m provides that Defendant shall be liable to Plaintiff and
12 Class for violations of 15 U.S.C. § 1693 *et seq.* in the amount of, *inter alia*, statutory
13 damages to be determined by the Court, the costs of this action and reasonable attorneys'
14 fees.

15 42. On November 27, 2009, the Federal Deposit Insurance Corporation ("FDIC")
16 - a major regulator of many banks—issued Financial Institution Letter 66-2009 reiterating
17 the fact that the EFTA requires ATM operators to post ATM fee notices both (a) in a
18 prominent and conspicuous location on or at the automated teller machine, and (b) on the
19 screen or on paper before the consumer is committed to paying the fee. The letter also noted
20 that the FDIC had first notified FDIC-supervised banks of these requirements in a Financial
21 Institution Letter dated March 23, 2001 (FIL-25-2001).

22 43. By way of this action, Plaintiff seeks the imposition of statutory damages,
23 costs of suit and attorneys' fees.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff, on behalf of himself and the members of the class, prays
3 for:

- 4 a. An order certifying the class and appointing Plaintiff as the
5 representative of the class, and appointing counsel for Plaintiff as
6 counsel for the class;
7 b. An award to Plaintiff and the members of the class of statutory
8 damages;
9 c. Payment of costs of suit; and,
d. Payment of reasonably attorneys' fees.

10 **A TRIAL BY JURY IS DEMANDED.**

11 Dated: September 14, 2012

Respectfully submitted,

12 **REEVES, HERBERT & ANDERSON, P.A.**

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